A Bioethics of the Strong

James Mumford

Crypto-theocrats. Trumped-up philosopher kings. Naked neocons. Proud paternalists. Recall the deep suspicion that President George W. Bush's Council on Bioethics attracted.

Bioethics had been high on Bush's agenda from the start. On August 9, 2001, he had given the first-ever televised presidential address devoted entirely to the subject, announcing that federal funding would be permitted for research on existing embryonic stem cell lines but not for research on new ones, as that would have meant the further destruction of human embryos. Then, on November 28, Bush issued an executive order establishing the President's Council on Bioethics. But instead of packing it with the usual suspects—only three of the eighteen original members were full-time research scientists—Bush instead invited to the table political theorists such as Michael Sandel and theologians such as Gilbert Meilaender. Most controversially, he named as chair Leon Kass, a biochemist-turned-philosopher described by the contemporary press as a pessimistic thinker who, as reporter Nell Boyce put it at the time, "tends to dwell on the dark side of modern medicine."

What It Means to Be Human: The Case for the Body in Public Bioethics
By O. Carter Snead
Harvard ~ 2020 ~ 321 pp.
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Holding twenty-one meetings, and authoring seven reports addressing issues ranging from cloning to reproductive technologies, end-of-life care to human enhancement, the council under Kass's leadership between 2001 and 2005 was no ordinary quango, no boring bureaucratic sounding board. Its remit was far broader than merely identifying whether a certain biotechnological intervention met health and safety standards. Instead, the Kass Council was tasked to "undertake fundamental inquiry into the human and moral significance of developments in biomedical and behavioral science and technology."

To give *that* brief to a *public* body was, according to many vociferous

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critics, simply unacceptable. Implacable opponent Ronald M. Green, now professor emeritus of religion at Dartmouth, bewailed the council in this fashion: "Untethered from the need to provide concrete policy advice to agencies facing pressing problems, the PCBE instead became a forum for those opposed, often on sectarian religious grounds, to all the possibilities of modern reproductive and genetic medicine."

The charge is clear. For a public body to advise on public policy based on religious convictions not shared by the entirety of the American populace is a violation of the basic requirements of liberal neutrality. That is, the council was not some private group competing in a pluralistic nation's marketplace of ideas, trying to win around citizens to a particular vision of the good—say, working to dissuade us from pursuing genetic enhancement. No, it was directly advising the president about what coercive policies should be enacted by the state.

It is a powerful condemnation whose remnant goes a long way toward explaining the impoverishment of public bioethical debate today. Orlando C. Snead, a professor of law and the director of the de Nicola Center for Ethics and Culture at the University of Notre Dame, was general counsel to the Kass commission from 2001 to 2003, and his new book, *What It Means to Be Human*, can be read as a defense of the council against this sectarian charge. Though he doesn't frame it as such, the book sets out a sweeping justification for the "richer bioethics" the Kass Council advocated.

How does Snead set about this defense? He denies that, when it comes to the "vital conflicts" with which the presidential commission was engaged, there can ever be such a thing as liberal neutrality:

> In much of American law and policy there may be a "live and let live" *modus vivendi* available, where governmental neutrality can simply make space for different forms of private ordering, each according to the diverse normative commitments of various members of the polity. But American public bioethics presents vital conflicts where either through action or inaction, *the state must take sides.* [emphasis added]

For Snead, it is fanciful to believe that public bioethics can be carried out without some value-laden anthropology, some account of what human nature *is.* No, not just fanciful: It is downright deceptive. *Any* policy will presuppose some picture or another of what it means to be human. It is not possible to bracket out these kinds of substantive philosophical claims. And this means that the real question, for Snead, is which anthropology it's going to be. Which is the most phenomenologically

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adequate, the one that accords best with our lived experience?

For Snead, American public bioethics already *does* have an anthropology, one it pretends not to have: expressive individualism. Drawing upon a host of twentieth-century social theorists—Robert Bellah, Charles Taylor, Alasdair MacIntyre and Michael Sandel—Snead tries to make less familiar expressive individualism's account of what it means to be human, allowing us to see it afresh as what it really is: one historically contingent vision among others.

At the heart of expressive individualism is the unencumbered self, the atomized individual, shorn of social ties, long on rights but short on duties, always operating at the height of his or her cognitive powers. One's flourishing consists "in the expression of one's innermost identity through freely choosing and configuring life in accordance with his or her own distinctive core intuitions, feelings, and preferences." By privileging the *will*, this anthropology is forgetful of the *body*. By extension, it is forgetful of the "lived realities of vulnerability, mutual dependence, and finitude."

Snead's sketch of expressive individualism is good and necessary, but it is when he turns detective, when he sets out to unearth *where* that atomistic anthropology is at work in American case law, that the book really comes into its own. Most of the book is structured around this work, with one chapter showing how this anthropology manifests in court rulings on abortion, one chapter on assisted reproduction, and one chapter on end-of-life questions such as assisted suicide and when to carry out life-saving measures.

Snead's analysis begins with the "paradigmatic case" that is *Roe v. Wade*. Justice Harry Blackmun, in his famously short majority opinion in *Roe*, trades upon a picture of pregnancy as a bodily encumbrance. In this picture, the unborn child—or *newone*, in my preferred term*—is an intruder, and its dependency upon its host is parasitic. This picture assumes that such a situation is pathological. Moreover, it construes obligations as strictly contractual—arising not from the nature of the relationship itself, marked as it is by radical dependency—but only from both agents' *assent* to this relationship. Therefore, the host should feel free to decide not to continue to provide life support to the newone. Abortion is thus pictured, problematically, as a passive letting-die rather than an active killing.

Justice Blackmun claimed to be neutral on the status of the newone.

* This term, rather than the ideologically loaded "fetus," "product of conception," or "unborn child," is how I will refer to the prenatal human organism. See my *Ethics at the Beginning of Life: A Phenomenological Critique* (Oxford, 2013), reviewed in these pages in the Summer/Fall 2014 issue.

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Yet the Court conferred moral and constitutional personhood, and the enjoyment of due process and equal protection under the law that personhood confers under the Fourteenth Amendment, upon only the parent, not the newone. And this meant that the Court actually *was* taking a substantive position. The state was coming down on one side.

The terminology Blackmun adopted to refer to the newone, as a "potentiality of human life," could hardly be more metaphysically laden. It presupposed that bodily life, in whatever stage of development, was not co-extensive with personal life. Blackmun's acknowledgment that the state had a "compelling" interest in the life of the newone only after "viability," when the newone has the capacity for "meaningful life outside the mother's womb," reflects a view of human existence where our autonomy, our ability to exist independently of other human beings, is the all-important threshold. That is a philosophical position, whatever way you look at it—one that assumes, in line with expressive individualism, that the exercise of various capacities is what makes an entity a person.

The expressive individualism implicit in *Roe v. Wade* was made explicit in the 1992 case *Planned Parenthood v. Casey*, when, against expectation, the Supreme Court reaffirmed the essential holding of *Roe.* Central to Justice Kennedy's opinion was this now-infamous thesis: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Snead describes this line as "a paean to *liberty* of a very particular sort. It is the freedom of the unencumbered atomized will—the self-originating source of valid claims." And it is from this freedom that the right to an abortion springs.

Snead is convincing, then, that a distinct philosophy indeed underlies the Supreme Court's various vexed decisions on abortion, and that this philosophy is expressive individualism. But, returning to our original question, how phenomenologically adequate is expressive individualism when applied to the beginning of life?

This is where the cool detective becomes a passionate advocate. In a key passage, speaking for the first time in the first person, Snead argues:

> I believe it is true that persons are free, particular, and individuated beings, and that interrogating and then expressing the truths discovered in one's inner depths can be a fruitful and dynamic source of meaning.... Each person is, in deep and important ways, associated with his or her will, judgment, rationality, and cognition....
>
> The problem for American abortion law is that this is not the *whole* truth about human beings.... What is missing? A serious

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> consideration of *embodiment* and its meaning and consequences.... Specifically, the Court is blind to the reality of vulnerability, dependence, and natural limits.

"Viewing human identity through the lens of expressive individualism," Snead continues, it's unsurprising that "the Court excludes from the community of legal persons those living human organisms not yet capable of actively discerning, inventing, and pursuing the projects essential to self-definition." But that is a problem—for that is the state in which we are found at the beginning of our lives. And, for most all of us, it is the state into which we will return at some point later.

Expressive individualism is not limited to jurisprudence on abortion, however. It also has a grip on the way we think about assisted reproductive technologies, which Snead takes up next.

It is well recognized that, when it comes to assisted reproductive technology (ART), America is the Wild West. In many European countries—France, Germany, and Spain, for instance—both commercial and altruistic surrogacy is banned. In the United Kingdom, the Human Fertilisation and Embryology Authority prohibits pre-implantation genetic diagnosis for the purposes of sex selection. In the United States, by contrast, what you have the power to do you mostly have the right to do. This leads Snead to observe that "from this absence of law arises a very particular kind of freedom, perfectly suited for the atomized individual will seeking to express the originality discovered within itself, and to pursue the life plan of its own authentic design." Expressive individualism explains why the fertility market is unfettered.

The godfather of the laissez-faire intellectual framework surrounding reproductive technology is John Robertson, the late legal scholar and former chairman of the American Society for Reproductive Medicine's Ethics Committee. His book *Children of Choice* is a staple in undergraduate courses on reproductive ethics, and a critique of it as trenchant as the one Snead provides is long overdue.

Robertson's central contention is that if, according to the Supreme Court's abortion jurisprudence, *avoiding* procreation is a right, then the converse is also true: There is also a right *to* procreation. Procreative liberty, "the freedom to decide whether or not to have offspring," is essential to human flourishing. Reproductive technologies are thus "the means to achieve or avoid the reproductive experiences that are central to personal conceptions of meaning and identity."

In practice, giving primacy to procreative liberty gives free rein to adults to specify *which* child they want and *when.* Robertson notes

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philosopher Derek Parfit's ingenious non-identity problem, which argues that no reproductive technology can be considered harmful to a child it creates because that child would not have been born otherwise. Using this principle, Robertson dismisses a wide range of objections to assisted reproduction. What if intracytoplasmic sperm injection, a form of IVF, results in birth defects—a question still under debate? Is it good for a child not to know its father? Is it good for a child to have been enhanced according to the whims of its parents? It doesn't matter. Those children are lucky to be born at all. They cannot be said to be harmed, for the counterfactual or alternative—which is necessary in law to establish a harm—is non-existence.

Why is expressive individualism phenomenologically inadequate here? For Snead, it is because the phenomenon of *parenthood* remains entirely invisible. "Assisted reproduction, like all reproduction, involves parents and children. The complexity that arises from advances in the medicine and biotechnology of ART does not change this fact, even as it fractures the previously integrated dimensions of procreation."

Consider a case of maximal usage of assisted reproductive technology: A couple commissions a pregnancy, buying both sperm and eggs, and then pays a surrogate to carry the child to term. Procreation has been commodified, certainly. But the transactional nature of the relations between the parties doesn't negate the fact that they have brought a child to life and thus have become parents. To view and to treat the child arising from IVF as a *product*—the created object required to bring about a desired "reproductive experience"—is to fail to acknowledge the fundamental reality of what that child is. The conception of procreative liberty at work in American case law, then, is based on a fatally incomplete view of ourselves.

In 1997, anyone who was anyone in analytic political philosophy—Ronald Dworkin, John Rawls, Judith Jarvis Thompson, Thomas Nagel, Thomas Scanlon, and Robert Nozick—filed an amicus brief to aid the Supreme Court's considerations of two cases that sought to strike down state bans on assisted suicide. Publishing their "Philosophers' Brief" in the *New York Review of Books*, these liberal luminaries anticipated the general charge that was later to be lobbed at the Kass Council:

> Any paternalistic justification for an absolute prohibition of [assisted suicide for terminally ill] patients would of necessity appeal to a widely contested religious or ethical conviction many of them, including the patient-plaintiffs, reject.

Why would a prohibition necessarily be paternalistic? The philosophers

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do not elucidate their claim, but the answer is supposedly because a ban on assisted suicide presupposes a religious conviction that life retains value even in the throes of horrific illness. Framed this way, any argument against assisted suicide appears to violate liberal neutrality.

In his book's final chapter, on end-of-life questions, Snead doesn't engage with this crucial passage from the philosophers' brief. But the heart of his argument, again, lies in the insistence that this way of framing the vexed question of assisted suicide is fundamentally duplicitous. The philosophers' brief is steeped in the particular substantive philosophy that is expressive individualism:

> Most of us see death—whatever we think will follow it—as the final act of life's drama, and we want that last act to reflect our own convictions, those we have tried to live by, not the convictions of others forced on us in our most vulnerable moment.

The philosophers here have done us the favor of laying their particular anthropology smack on the table, with its distinctive values in plain view. Now we can again assess its phenomenological adequacy. And what we see is that in applying this autonomous self, this fully-fledged agent, to the actual circumstances of the end of life, the philosophers are guilty of *idealization.* Snead writes, "the anthropology of expressive individualism fails to account for the diminished agency at the margins of life for an embodied being in time, [and] overstates the possibility of autonomy in this setting." Highlighting the strong connection between suicidal ideation and depression, and the correlation between depression and cancer, Snead argues powerfully that for the law to take as a model of rational agency the individual seeking assisted suicide is simply not to have truck with reality.

The greatest achievement of Snead's outstanding contribution in *What It Means to Be Human* lies in watching a tenacious lawyer turn the table on opponents who think it's possible to do bioethics in a philosophical vacuum. There is no neutral ground.

But the book's achievements extend beyond the academic study of medical ethics. For those with eyes to see it, Snead is making a significant contribution to a genuinely public philosophy. As I've mentioned, the primary criticisms of the Kass commission were two-fold: that it was willing to use thick moral traditions to describe and evaluate contemporary, seemingly "technical" conundrums, and that it paid too much attention to the "dark side of medicine." Snead's work addresses the first of these directly and at length, but it also touches upon the second.

The charge of dwelling upon medicine's dark side is meant as a criticism.

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But is it not a compliment? For don't we want our brightest thinkers to do precisely that? As bioethicist Philip Lorish has written to me in a private exchange,

> Given humankind's proclivity for abuse, the inherent imbalance of power between doctor and patient in medical care, and the many examples of abuse disguised as progress, don't we need bioethicists who will consider not simply the possibility to heal but also the likelihood of harm?

Here Snead's work can be understood as a contemporary expression of Judith Shklar's "liberalism of fear." In the essay that bears that name, Shklar, the underappreciated Harvard political philosopher whose work has received new eyes in our day, mounts a defense of liberalism as a political philosophy primarily alert to the abuse of power. "Liberalism's deepest grounding is…in the conviction of the earliest defenders of toleration, born in horror, that cruelty is an absolute evil." What Shklar sees of liberalism as a whole, Snead rightly sees as having provoked bioethics in particular. Bioethics emerges, in Snead's view, as "the succession of political and legal reactions to the reported use, abuse, and exploitation of the weakest and most vulnerable members of the human population"—abuses such as the Tuskegee syphilis experiments or the 1973 revelation that NIH researchers had engaged in research on still-living aborted neonates. Thus Snead's trepidation, which I share, that the legalization of assisted suicide will prove ultimately coercive, with elderly or terminally ill men and women who already feel themselves a burden being subtly pressured to hasten their deaths.

Snead's volume, which if recent history is any guide will be received as a rebuke of liberalism, is actually a plea for it. For Snead has traced the way that the law has taken certain liberal principles, such as the sovereignty of the individual, so far that it has created a politically *illiberal* status quo—one in which, particularly at the beginning of life, the strong wield lethal force against the weak. You can call it the exercise of freedom, or you can call it the abuse of power.

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